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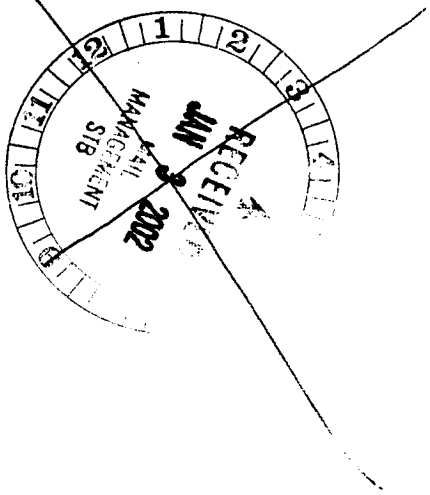

January 3, 2002

Via Hand Delivery
Surface Transportation Board
Office of the Secretary
Case Control Unit
Attn: STB Ex Parte No. 586
1925 K Street, N.W.
Washington, DC 20423-0001

Re: Consolidated Railroad Reporting
STB Ex Parte No. 586
Reply Comments of Genesee & Wyoming, Inc.

Dear Sir or Madam:

Enclosed for filing in the above referenced proceeding are an original and 10 copies of the Reply Comments of Genesee & Wyoming, Inc., along with a diskette containing the document in a format (WordPerfect 6/7/8) that can be converted by, and into, WordPerfect 9.0.

Please time stamp the extra copy of this letter to indicate receipt, and return it to me in the stamped self-addressed envelope provided for your convenience.

Very truly yours,

Eric M. Hocky

Enclosures

EMH/mjr
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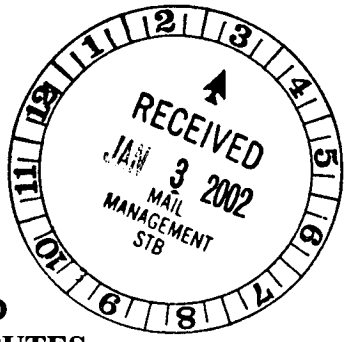

BEFORE THE
SURFACE TRANSPORTATION BOARD
STB EX PARTE NO. 586

ARBITRATION – VARIOUS MATTERS RELATING TO ITS USE AS AN EFFECTIVE MEANS OF RESOLVING DISPUTES THAT ARE SUBJECT TO THE BOARD'S JURISDICTION

REPLY COMMENTS
OF
GENESEE & WYOMING INC.

ERIC M. HOCKY
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P.O. Box 796
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Dated: January 3, 2002

Attorneys for Genesee & Wyoming Inc.
and its Subsidiary Railroads

BEFORE THE
SURFACE TRANSPORTATION BOARD
STB EX PARTE NO. 586

ARBITRATION - VARIOUS MATTERS RELATING TO ITS USE AS AN EFFECTIVE MEANS OF RESOLVING DISPUTES THAT ARE SUBJECT TO THE BOARD'S JURISDICTION

REPLY COMMENTS OF GENESEE & WYOMING INC.

The Board commenced this proceeding by decision served September 20, 2001 (the "Decision"). The Board set forth three purposes for the proceeding: (1) to update the Board's list of arbitrators, (2) to remind and encourage users to take advantage of the Board's existing voluntary arbitration procedures, and (3) to explore issues relating to binding arbitration of "small rail rate disputes." Decision at 2. Comments were filed by a number of parties including railroads, shipper groups, trade associations and the United States Department of Transportation ("USDOT"). Genesee & Wyoming Inc. ("GWI") filed comments on behalf of itself and its subsidiary railroads, and was the only party that filed to address the concerns of shortline railroads. GWI files these Reply Comments to respond to some of the points raised by other parties as follows:

1. Of the Comments that support mandatory arbitration, many do so on the basis of the perceived economic inequities between shippers and "large and powerful railroads that exist today." *See*, for example, ARC Comments at 3. *See also* Wheat, Barley and Grains Commissions

Comments at 1-2. However, with Class II and Class III railroads such as those controlled by GWI, that economic imbalance is not present.

2. Many of the Comments that support baseball style arbitration cite the Canadian system as an example of how the system works there. However, it is not clear that the Canadian system has benefitted small shippers. Only 23 cases have been brought under the Canadian system since 1988 and most of them reportedly involved large carriers, large shippers and large amounts in dispute. *See* attachment to USDOT Comments; Canadian Railways Comments at 3. Further, the railroads that have experience with the system do not believe that the system has been effective in resolving disputes between shippers and railways in Canada. Canadian Railways Comments at 1. Accordingly, there is no consensus that final offer arbitration will benefit small shippers or be useful to resolve small rail rate disputes.

3. There is no consensus that the use of mandatory arbitration will save significant amounts of expenses, or that it will be inexpensive enough to be beneficial for resolving small rate disputes. The Canadian system is reportedly still very expensive to litigate. *See* attachment to USDOT Comments; Canadian Railways Comments. Indeed, so long as the statutory prerequisites of market dominance and rates in excess of 180% of variable cost still need to be satisfied,[1] there will be discovery, experts and attorneys that will be required. Further, as GWI noted in its Comments, shortlines may be required to incur significant accounting expenses in order for their current records to be converted into those that fit the established criteria for the determinations to

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[1] While there seems to be some disagreement among the commenting parties about whether these determinations should be made by the arbitrator or outside the arbitration, the parties universally acknowledge that the determinations need to made and that it would be the shipper's burden to demonstrate that the criteria have been satisfied.

be made under the statute. Preliminary jurisdictional issues such as these have been responsible for increasing the time and costs of the Canadian process. Canadian Railways Comments at 5, 7. Without a substantial reduction in the cost and expense from the STB's current process, arbitration is unlikely to be attractive to small shippers and there is no reason to require it.

4. As noted by several parties, there has been little interest in the use of the voluntary arbitration procedures that have been adopted by the Board. See AAR Comments; John Fitzgerald Comments. Without experience there is no data for the Board to consider to determine if arbitration will work, if there are sufficient qualified arbitrators, how expensive it will be or what the results will be. Reports on the Canadian system are mixed. Since there is no evidence that arbitration will work, it would be premature for the Board to suggest making it mandatory.

5. The question of what criteria will be applied by the arbitrators in selecting the more reasonable offer remains open. To the extent that proponents suggest that the arbitrator should set the rate at 180 % of variable costs, they are not properly applying the statutory criteria. The 180 % of variable costs is merely a safe harbor, and the statute makes it clear that there is no presumption that rates above 180 % of variable costs are unlawful. As USDOT notes, if arbitration were used merely to reduce rates to 180% of variable costs, that would eliminate the ability of railroads to price differentially and threaten their economic well-being. USDOT Comments at 6.

GWI joins with the parties such as USDOT and AAR that stress the importance of giving the arbitrators a set of standards to use in determining a "reasonable rate." USDOT acknowledges that the current standards might be too extensive and expensive to litigate, even in arbitration, but it is not aware of any standards at this time that would be fast and simple while

preserving the underlying ICCTA standards. USDOT Comments at 7. *See also* Western Coal Traffic League Comments at 10. No party has suggested any simplified standards that might be applied. Only with simplified methodology and guidelines will arbitration be inexpensive enough for small shippers to be able to benefit from the process. North Dakota Wheat Commission Comments at 2.

Until such a simplified standard is developed, GWI believes the arbitration process will be no more accessible for small rate disputes than the current process, and there is no need to impose mandatory arbitration.

6. The complicated determinations that are necessary to be made requires extensive experience that the Board and its staff currently possess. AAR Comments at 2-3; USDOT Comments at 4; North Dakota Wheat Commission Comments at 3.[2] It is unclear whether the arbitrators will have the same level of knowledge and experience. Without a sufficient number of qualified arbitrators, parties will not be willing to take advantage of the process.

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[2] Large shippers acknowledge the benefits of the Board's expertise and procedures in resolving their disputes. *See* Edison Electric Institute Comments; Western Coal Traffic League Comments at 5. Indeed, they do not want arbitration to replace the regulatory scheme and lose the protections they have under the current process.

Conclusion

For all the foregoing reasons, GWI and its subsidiary railroads believe that the Board should not recommend mandatory arbitration of rates as a general rule. Even if the Board continues to believe that arbitration should be required in certain situations where there is the potential for shippers to be prejudiced, arbitration should not be mandated for rate complaints against Class II or Class III carriers.

Respectfully submitted,

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